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FIRST APPEAL NO.1340 OF 1995 WITH CROSS OBJECTIONS

Date of Decision : 18.3.1996

For Approval & Signature
THE HON'BLE MR. JUSTICE N.J. PANDYA
AND
THE HON'BLE MR. JUSTICE A.R. DAVE

1. Whether reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder ?

5. Whethe...

Civil Judge ?

FIRST APPEAL :

Mr. M.R. Anand, learned GP With Mr. A.J.Desai, learned AGP for the Appellant.
Mr. H.K.Parmar , learned Advocate for the Respondent

CROSS OBJECTIONS :

Mr. H.K. Parmar, learned Advocate for the Applicant
Mr. M.R. Anand, learned GP with Mr. A.J.Desai, learned AGP for the Opponent.

CORAM ; N.J. PANDYA & A. R. DAVE, JJ

18.03.1996

ORAL JUDGMENT ; (Per : Pandya, J)

This appeal arises out of a judgment of the learned Civil Judge (S.D.), Ahmedabad (Rural) at Mirzapur in Special Civil Suit No. 335 of 1995 given on 2.12.1994. The suit was for recovering damages to the tune of Rs. 3,44,38,476.00. The suit is based on law of torts,action in negligence. The learned Trial Judge, by the said judgment, allowed the suit partly and granted decree in favour of plaintiff respondent to the tune of Rs.76,02,000/ with interest at the rate of 12% p.a.from the date of the suit till realization and of course with costs.

The cross-objections are filed by the original plaintiff-respondent for the sum of Rs. 64 Lakhs. The net result, therefore, is that though the suit was for abovereferred amount, after getting the said decree of Rs. 76,02,000/, the plaintiff has restricted his claim in cross-objections to Rs.64 Lakhas. In other words, now he is restricting his claim to Rs. 1,40,02,000/.

The plaintiff respondent was working as Class : A contractor with the Public Works Department (Irrigation) of the State of Gujarat who is Executive Engineer having his office at Rajkot for Rajkot Division. It was for that division that the plaintiff was registered as Class : A contractor since 1980. Prior thereto, he was registered in Class : B since 1979. He also applied for his upgrading to Class : AA contractor in the year 1982. That application is pending.

From time to time, his registration was renewed and it was operating till 31.12.1989. For renewal, PWD in its Manual, has laid down certain guidelines and has also issued administrativeexecutive instructions. Manual may or many not have statutory force with which we are not concerned for the disposal of the present matter.

The grievance made by the plaintiff is that his renewal after 31.12.1989 has not been granted. It is also his grievance that this has not been granted as proceedings for blacklisting him in respect of one contract awarded to him were initiated by the PWD authorities and keeping grudge as to that alleged default on the part of the plaintiff, his registration has been withheld. Factually, he has applied for renewal of his registration on 10.3.1990 by writing a letter exh.103. This was replied to by the department by Executive Engineer, Rajkot by the letter exh.105 dated 8.8.1990.

This prompted the plaintiff to approach Chief Engineer as

per letter exh.106 dated 9.10.1991 and Chief Engineer, it seems, has referred the matter to the Executive Engineer who in turn wrote a letter exh.107 dated 22.10.1991 where reference again is made to the said letter exh.105 dated 8.8.1990 and there is where the matter ends.

The suit came to be filed in the year 1992. It was preceded by the exchange of statutory notice and other formalities required.

In the trial court, the State had filed detailed and elaborate written statement. So far as the dispute as to registration is concerned, it is to be found from page-8 onwards page 168 of the paper book. Written Statement itself is at exh.9. It is the clear stand of the department and the State both,that the plaintiff failed to submit his application for renewal in prescribed form and has also failed in sending along with said forms, required documents and payment of fees as prescribed. It is also categorically asserted in the written statement that the plaintiff who has been working with the department as approved contractor right from the year 1978 till 1989, he was fully aware of the renewal procedure and his renewal from time to time having been granted - last one being 31.12.1989, the plaintiff ought to have applied in the prescribed form giving all the documents and paying fees.

Thereafter in para-8 of the written statement, reference is made to the said letter addressed to the Chief Engineer which has been replied to by the Executive Engineer.

In paras-9, 10 & 11 of the written statement at pages 169 & 170 of the paper-book, the State and the Executive Engineer averred that two issues sought to be linked by the plaintiff issue of blacklisting and proceedings going on for that purpose and issue of his renewal of registration, and both issues are not at all interconnected and the department is proceeding with both the chapters independent of each other and in total isolation thereof. In other words, the averments made in plaint as to withholding of registration because of the blacklisting proceedings are denied by the department.

If at all there is a link between initiation of blacklisting procedure by way of show-cause notice dated 5.1.1988, is nodoubt preceding in point of time to the said request of renewal. However, as can be seen from the written statement as well as other material on record, his renewal up to 31.12.1989 was not granted at a stretch. Initially. it was granted only up to 31.12.1988 and thereafter it was extended till 1989 as certain formalities as to submission of solvency certificate from revenue department etc. were yet to be completed. Subsequently, fresh renewal certificate exh.95 came

to be issued making registration valid up to 31.12.1989 (Paper Book page 628).Thus, the position is that on one hand, blacklisting proceedings were initiated and on the other, renewal came to be granted up to 31.12.1989 at two stages inspite of initiation of said blacklisting proceedings.

The assertion made in the written statement that the plaintiff was aware of the required procedure is more than substantiated by the fact that the very renewal up to 31.12.1989 was the result of application submitted by the plaintiff on 4.4.1987 in the prescribed form.

Nodoubt, on earlier occasion, the plaintiff had not submitted the prescribed form and had got registration renewed by writing a letter exh.36, but then he had not rest content by making simple request for renewal of registration, but has forwarded along with that over and above original registration certificate, the solvency certificate and other requisite documents and also registration fees.

In this background, if we see exh.103, it is merely a four line letter saying that the plaintiff is forwarding registration certificate valid upto 31.12.1989 and requests renewal and further requests to do so on taking prescribed fees.

To this response was exh.105 where department has pointed out that for renewal of registration, documents are required as well as payment of prescribed fees on submission of which the process for renewal of registration will be taken on hand.

Reading exh.105, it is quite clear that department has never refused registration. Much less, therefore, there could not be a case of department sitting over the request of renewal of the registration on the alleged ground of blacklisting proceedings. It is an admitted position that this letter exh.105 was not replied to by the petititoner till he submitted exh.43 page 345. This is dated 15.11.1991. As noted earlier, this was preceded by the communication addressed to the Chief Engineer in the month of October 1991 exh.106 page 646. In this letter also, the plaintiff has not sent either documents or registration fees.

The learned Trial Judge, in his judgment, while discussing the relevant issue no.10 which he has decided to discuss with issue nos. 5, 11, 12 & 13, has referred to the letter dated 9.1.1988 said to have been written by the plaintiff where he has attempted to link blacklisting proceedings with the request of renewal.

However, in our opinion, the learned Judge is totally wrong in referring to the said letter dated 9.1.1988 as except for there being a reference to it, in the written statement, the letter itself is not produced on record and, therefore, there is no question of it having been exhibited.

As if this is not enough, the request for renewal could not have remained pending on or about 5.1.1988 whereby the blacklisting proceedings came up and this was far away in point of time when occasion for making request of renewal would arise. In fact, request for renewal was made after expiry of registration on 31.12.1989. There are provisions in the guidelines - page 254 onwards that request of renewal after prescribed time can be entertained, but for that penalty will have to be paid namely double the registration fees. There also, the grace period is put that if contractor approaches within three months of the expiry of registration, then payment of single registration charges will be required to be made. In other words, no penalty will be levied.

The request having been made accordingly as per exh.103 in the month of March 1990, writing of a letter said to have been written by the plaintiff as per written statement on 9.1.1988, in no way would be of any use to the Learned Judge for arriving at a conclusion that withholding of registration was the result of pending blacklisting proceedings. The action of the PWD authorities in not renewing registration is to circumvent the penalty proceedings from the plaintiff's point of view since consequence of refusal of registration would be that without following the blacklisting proceedings, the authorities would have achieved the object namely plaintiff will be ceased to be operating as contractor and, thereby proceedings with respect to blacklisting the contractor can be given go-bye. However, the reply of the department exh.105, on the contrary, indicates that the matter of renewal can be taken on hand only on completion of said formalities including the payment of prescribed fees.

An attempt was made on behalf of plaintiff by learned Advocate Shri H.K. Parmar that the plaintiff is an ordinary contractor though of Class:A and seeking tobe upgraded to Class:AA, he would not know procedure and, therefore, he had applied on his letter head as if he is writing a letter.

However, as noted earlier, this is not the position. Once he has already filled up prescribed form dated 4.4.1987 and on another occasion, though he had applied on letter head without filling up the prescribed form, he had sent documents as well as prescribed fees.

In this background, an attempt was made on behalf of the

plaintiff to make out a case what the Executive Engineer Shri Vala has stated in the cross-examination in his deposition exh.165 page 544 onwards particularly page 574 that filling of prescribed form is immaterial. However, said witness has also stated that form may not be filled in, but the conditions of the form has to be fulfilled.

In other words, application for registration will not be insisted upon by the department being filled in the prescribed form, but the documents required to be tendered along with the prescribed form in any case will have to be submitted along with the application made in any other manner. The same will be the position with regard to the prescribed fees as per those documents and as per administrative instructions and guidelines, the plaintiff is only to pay Rs. 250/.

Thus the initiation of blacklisting proceedings seems to have created in the mind of the plaintiff fear psychosis which for plaintiff's own reasons, has been blown-up into the larger controversy of registration having been withheld only on that count and thereafter the case is sought to be made out that this amounts to negligence and that too actionable negligence.

Unless by leading evidence of linking said proceedings of blacklisting with non-attending request of registration, mere subjective feeling of the plaintiff cannot help him. The learned Judge unfortunately seems to have been carried away by this very portrayal of the situation as shown by the plaintiff which on closer scrutiny, appears to be total subjective.

The different dates set out above clearly show that blacklisting proceedings though initiated, requests of the plaintiff were attended when occasion to renew registration arose, but insisting to supply all necessary documents and payment of requisite fees. In the letter exh.105, no mention is made of prescribed form. As noted above, the department has not refused registration atall.

The net result is, therefore, the case put forward in the written statement that registration is not attended as the plaintiff has not complied with the requirements is more than made out.

We note with satisfaction the efforts made on behalf of the respondent to convince us that this would be actionable claim under law of torts, if negligence is established. For this, reference was made to various authorities and commentaries under law of torts largely on the basis of English decisions. For this purpose, 21st Edition of Law of Torts by Ratanlal & Dhirajlal was referred where general principles are set out in Chapter-I from page-3 onwards of that renown work shown to us and particularly

the idea of wrongful act as developed in English Law relied on by learned Advocate Shri Parmar.

We have got very lucid and very progressive pronouncements. The Hon'ble Supreme Court has set out in Salt Workers Case, reported in (1994)4 SCC P.1 where building of bar for protecting soil from ingress of sea water having resulted into flooding of plaintiff's factory, was held actionable and damages were awarded by the hon'ble Supreme Court. There, the principle of absolute liability as fault and no-fault liability has been closely examined and Their Lordships have categorically held that law of tort is not static. The common law principle have to be evolved and applied according to the complex character of the society which is emerging and court should also be mindful of the fact that where the State is doing its duty to the large section of the public, it cannot be unmindful towards the duties towards the person who is likely to suffer damages.

With regard to sovereign functions and defence based thereon, there is another Supreme Court decision in the case of S. Nagendra Rao & Company v/s State of Andhra Pradesh, reported in (1995)1 GLH 298. That being not the point here, we will not discuss the authority at length. However, in that decision also, Their Lordships of the Supreme Court have observed that the concept of public interest has been changed with structural change in the society. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligence. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken.

We respectfully bow-down these pronouncements and add our opinion that we subscribe to them whole-heartedly.

However, that would not help the plaintiff. For the reasons of the learned Judge, recorded at pages 83 & 84 for holding that there is actionable negligence which the plaintiff has been able to establish is, in our opinion, are totally unwarranted. There is no material on record to come to the aforesaid conclusion.

The documents produced by the plaintiff go to show that he was fully aware of the required formalities to be completed and yet except for writing letter exh.103, he does nothing and he was replied and that he also goes to the Chief Engineer with the said grievance, but neither he fulfills requirements called upon by the department nor does he approached the department seeking

clarification as to which documents are required and what will be the amount of fees payable by him.

At this stage, we may deal with the submission made on behalf of the appellant with regard to paras-25 & 26 of those administrative instructions in the form of Govt.Resolutions and more particularly to be found at page 274. There is a provision of appeal contained in paras 25 & 26.

Reliance is placed on these two paras not with a view to make out a case that there being the alternative remedy available to the plaintiff-respondent, but the submission is made to the effect that looking to these two paras, if plaintiff felt any negligence when his request for renewal was not attended to for the alleged reasons of blacklisting proceedings or any other reasons, he could have immediately approached the higher authorities. Trying to link the request to renew with problem of blacklisting proceedings, would necessarily not mean misfeasance. There should be intention on the part of the officer concerned deliberately for such stand with a view to put the plaintiff to disadvantageous position, if not put to loss.

In disadvantageous position he will be put to because he will not be able to do the business with the State Government and with Executive Engineer unless he is approved contractor. This will necessarily result into financial loss. However, whether there is link between the said action of blacklisting and non-renewal of registration or refusal to renew the registration would give an opportunity of taking the matter to the higher forum, where unless according to the plaintiff, authorities who can hear the appeal are also biased against him, there would have no question of his suffering any loss due to the alleged negligence.

As noted more than once, the department has never refused registration. All that it has asked for is that the plaintiff should supply documents and pay up requisite fees. But for fulfilling these requirements, no registration could ever be entertained much less it is renewed.

Exh.106 page 646 is nodoubt a letter addressed to the Chief Engineer, but it is in the nature of complaint with regard to the reply exh.105. Unless there is refusal by document, there is no question of there being any appeal either. Inspite of that the learned GP has referred to these two clauses to show that there is a check, though minimum, against the alleged misfeasance or malfeasance on the part of some of the officers of the State and thereby avoid possibility of the plaintiff being put to any loss.

The net result, therefore, is that the judgment of the trial court cannot be sustained and decree will have to be quashed and set aside.

Appeal, therefore, succeeds. The appeal is allowed with costs. The judgment and decree of the trial court is hereby quashed and set aside. The suit of the plaintiff is dismissed.

When we have held that the plaintiff failed to establish his case, there is no question of allowing his cross-objection either. For the reasons aforesaid, cross- objections are also dismissed with no order as to costs.

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